83-779

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

Wayne Laglia, Petitioner

v.

United States of America

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHANNING EDWARD BRACKEY
Attorney for Petitioner
524 So. Andrews Avenue
Suite 102N
Ft. Lauderdale, FL 33301
Telephone: 463-9800(305)

QUESTIONS PRESENTED

I. WHETHER THE DEFENSE OF ENTRAPMENT IS AVAILABLE TO AN ACCUSED WHEN A GOVERNMENT AGENT DOES NOT DIRECTLY CONTACT THE ACCUSED BUT SUBSTANTIALLY AND FORSEEABLY CAUSES A PRIVATE CITIZEN TO INDUCE AN UNWARY INNOCENT ACCUSED TO COMMIT A CRIME?

II. WHETHER AN ACCUSED MUST PRODUCE A MISSING WITNESS TO STATE WHAT HIS TESTIMONY WOULD BE AT TRIAL IF HE WERE NOT MISSING BEFORE AN ACCUSED IS ENTITLED TO A DISMISSAL OF CHARGES ON THE GROUND THAT GOVERNMENT DELAY PREJUDICED HIM BECAUSE THE WITNESS, MISSING AS A RESULT OF THE DELAYED TRIAL, WOULD HAVE PROVIDED TESTIMONY FAVORABLE TO THE ACCUSED, ESPECIALLY WHERE THE WITNESS IS A GOVERNMENT AGENT AND TESTIMONY AT TRIAL OF A WITNESSS WHO SPOKE TO THE MISSING WITNESS REVEALS IT WOULD HAVE BEEN BENEFICIAL?

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INDEX

CITATIONS

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No.

WAYNE LAGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Wayne Laglia, the Petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra) and the denial of rehearing (App. B, infra) are reported at 707 F.2d 1209 and 714 F.2d 159 respectively.

JURISDICTION

The judgment of the court of appeals (App. C, infra) was entered on September 1, 1983 after a timely suggestion for rehearing en banc was denied on August 15, 1983 (App. B, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I. WHETHER THE DEFENSE OF ENTRAPMENT IS AVAILABLE TO AN ACCUSED WHEN A GOVERNMENT AGENT DOES NOT DIRECTLY CONTACT THE ACCUSED BUT SUBSTANTIALLY AND FORSEEABLY CAUSES A PRIVATE CITIZEN TO INDUCE AN UNWARY INNOCENT ACCUSED TO COMMIT A CRIME?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition involves the following

Constitutional provisions:

a. Fifth Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

b. Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

This Petition involves the following statute:

18 U.S.C. § 3161 et seq., The Speedy Trial

Act.

The pertinent text is set forth in Appendix E.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, Petitioner was convicted of Conspiracy To Possess with Intent to Distribute A Controlled Substance in violation of 21 U.S.C. § 841 (a) (1) and Possession with Intent to Distribute a Controlled Substance in violation of U.S.C. § 841 (a) (1) and 18 U.S.C. § 2. The trial was on a supersedeas Indictment. (Case 81-6036-CR-JCP-1) Petitioner had initially been indicted on June 30, 1980, following his arrest on June 18, 1980. (Case 80-6060) But this Indictment had been dismissed without prejudice on March 6, 1981 because of delay by Respondent.

After being reindicted on April 6, 1981, Petitioner requested the charges be dismissed again because of his failure to receive a speedy trial. This request was denied and

trial commenced on June 24, 1981. At trial, Petitioner and his two co-defendants raised the defense of entrapment. The jury was given a standard instruction regarding the defense of entrapment. The jury was not instructed, as requested by Petitioner, that the entrapment instruction was applicable to him as well as his co-defendant even though he had not been directly induced by a government agent to commit the crime with which he was charged. Also denied by the trial court was Petitioner's Motion to Dismiss because he had been denied a speedy trial which he renewed at the end of the Respondent's case and at the end of all the evidence. Relevant both to Petitioner's defense of entrapment and his Motion to Dismiss because of a denial of a speedy trial was the testimony of a government informant, one Walter Coughlin[1], who was not

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[1]The Respondent indicated at a hearing on a Motion to Suppress Evidence that the informant's name was Walter Kelly. At trial a government agent testified the informant's real name was Walter Coughlin.

present at Petitioner's trial.

At the trial Donna Ambrose, a co-defendant, testified that she was introduced in February or March, 1980 to the confidential informant by a former boyfriend of hers. (T292) According to Ambrose, her initial contacts with the informant came whenever she went to visit her former boyfriend. (T293) Ambrose testified that on June 14, 1980, the informant called and asked to meet with her at the Glow Bar in Fort Lauderdale, indicating that he needed to make a "deal" and that his "life was on the line". (T295, 316) Ambrose met with him, and he informed her that he needed to make a drug deal because he was involved with a "big Mafia man coming in from New York (who) was dangerous, and would kill people." (T295) Ambrose testified that she told the informant that she could not help him, but that he grew more and more insistent, and acted "like he never heard me." (T298) Ambrose's recollections of that evening included a time when the informant pulled a gun and pointed it at her fact in an

attempt, as one attorney characterized it, to "giv(e) (her) a message...(that) I am serious, and I am not playing." (T325) As Ambrose described it, the informant was doing this to her because she was female and he knew that he could scare her. (R323) As a finale to the evening, Ambrose recounted that the informant pushed her off a bar stool when she refused his sexual advances. (T299) The next few days were filled with apologies from the informant, (T336-339), Ambrose's pleas to not make her a part of the deal, (T304, 344, 347), and the informant's warnings of the consequences - death - for withdrawing from the scheme. (T305, 339, 344) According to Ambrose, the informant wanted any types of drugs that she could supply. (T301, 343) It was during this period that Ambrose enlisted the aid of Petitioner who lived in her apartment building. (T126) She described her relationship with Laglia as "brother and sister". (T331)

Petitioner was described at trial by a detective of the Fort Lauderdale Police

Department as a "normal hard-working type of person" who was a "health-nut" that rarely drank and never smoked. (T408) Laglia was working as a part-time singer and as an instructor at a gym he part-owned. (T358-360) When Ambrose first related her problems to Laglia, he did not take her seriously. (T363) However, as the story began to unravel, Petitioner testified that he became convinced of the reality of her situation. Petitioner said he began checking around with his acquaintances to see if someone could help her out of her predicament. (T363) Petitioner also agreed to accompany her to the Tropical Palms Motel on June 18, 1980 to "see how Mafia" the men she had described to him really were. (T363) Petitioner testified that he became convinced of the truth of Ambrose's pleas when he saw Fiano, the cash and the informant whom he thought had a gun at the motel on June 18, 1980. (T365) On that day, after keeping the agent and informant waiting for five hours, Petitioner was arrested.

Petitioner's defense of entrapment was, of course, based on the conduct of the government informant toward one of his co-defendants, Ms. Ambrose. Petitioner sought to avail himself of the defense of entrapment through an instruction clearly indicating

> to the jury that when matters of inducement or entrapment were proven because of the conduct of agents of the United States in their approach to one of several defendants who then repeated the conversation to his co-defendants, including threats and the like, the co-defendants are entitled to the defense of entrapment, even though they were not directly approached by the government or its agents.

United States v. Ambrose, 707 F.2d 1209 (11th Cir. 1983). Thus, in addition to the standard instruction regarding the defense of entrapment given to the jury by the trial court, to wit:

> Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officer or their agents to commit a crime, he is a victim of entrapment, and the law, as a matter of policy forbids his conviction in such a case.
>
> On the other hand, where a person already has the readiness and willingness to break the law, the mere

> fact that Government agents provide what appears to be a favorable opportunity is not entrapment. For example, it is not entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to engage in an unlawful transaction.
>
> If, then the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the Defendant was ready and willing to commit a crime such as charged in the indictment, whenever opportunity was afforded, and that Government officers or their agents did no more than offer the opportunity, then the jury should find that the Defendant is not a victim of entrapment.
>
> On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the Defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the Government, then it is your duty to find him not guilty.

Petitioner requested the trial court to include the following charges:

> You are instructed that a person may be brought into a criminal scheme after being informed indirectly of conduct or statements by a government agent which amount to an inducement, and that person is then able to avail himself or herself of the defense of

> entrapment, just as the person who receives the inducement directly.
>
> You are further instructed that you may find that a person who received inducement indirectly may have been entrapped even if you find that the person who received the inducement directly was not entrapped.

The trial court failed to give the instruction and the jury concluded, without the testimony of the government informant which may have corroborated Petitioner's defense, that Petitioner was guilty.

Had the Petitioner's testimony been corroborated by the government informant, the outcome would have been certainly different. But as a result of government delay, the government informant was no longer available to testify. Nevertheless, Petitioner's Motion to Dismiss because of a denial of a speedy trial was repeatedly denied.

The United States Court of Appeal for the Eleventh Circuit provided Petitioner with no relief. The Court concluded it was bound by United States v. Mer, 701 F.2d 1321 (11 Cir. 1983) which held that a "defendant cannot avail

himself of an entrapment defense unless the initiation of his criminal activity is acting as an agent of the government." At 1340. Moreover, the Court concluded that the evidence was sufficient to present the case to the jury on the question of entrapment of Ms. Ambrose, but the jury rejected it. Therefore, the Court did not feel compelled to review whether the Petitioner had been entrapped.

REASONS FOR GRANTING THE WRIT

I. This case presents the issue of whether the government shall be permitted to punish an unwary innocent person who the government substantially and forseeably caused to commit a crime. It is a question whose answer should be without doubt. The "entrapment defense prohibits law enforcement officers from instigating a criminal act by persons 'otherwise innocent in order to lure them to its commission and to punish them'". United States v. Russell, 411 U.S. 423, 428-429, 93 S.Ct. 210 at 215 (1932). Nevertheless,

the United States Court of Appeals for the Eleventh Circuit concluded in the instant case that an accused could not avail himself of the defense of entrapment unless the accused was directly induced by a government agent. Since a private citizen had relayed the government agent's conduct and statements to the Petitioner, the Petitioner was not entitled to the defense of entrapment even though he presented evidence of compelling inducements instigated by the government.

The Court of Appeals for the Eleventh Circuit refused to consider United States v. Valencia, 645 F.2d 1158 (2d Cir. 1980).

In United States v. Valencia, supra, the Court of Appeals for the Second Circuit reviewed a case in which a defendant alleged that he had been brought into a criminal scheme after being informed indirectly of conduct and statements of a government agent which amounted to inducement. The accused claimed he was entitled to the defense of entrapment since the government agent's inducement was directly

communicated to him by another. The Court of Appeals agreed. It stated:

> If a person is brought into a criminal scheme after being informed indirectly of conduct or statements by a government agent which could amount to inducement, then the person should be able to avail himself of the defense of entrapment just as may the person who receives the inducement directly.

Id. at 1168.

Moreover, this rule is applicable even if a co-defendant who has been directly induced is found not to have been entrapped. This is because "the question of entrapment turns on the individual propensity of each defendant who may have been induced." Id. at 1169.

Thus, the instant case and United States v. Valencia, supra, are directly in conflict. It is a conflict which should be resolved by this Court. Petitioner submits the conflict should be resolved by approving United States v. Valencia, supra, for the existence of the rule of law established in the instant case could have substantial adverse consequences on the administration of justice. The decision of

the Court below condones and encourages government agents to commit reprehensible acts for the purpose of instigating criminal activity and punishing those involved, without fear that its conduct will be restricted. The government is given the opportunity, by the instant decision, to capture "unwary innocent" by using their loved ones or friends who have been threatened by government agents to perform criminal acts or else suffer physical injury.

When this Court first recognized and applied the entrapment defense in Sorrells v. United States, supra, it expressed a concern that the government should not instigate criminal conduct by persons who were not predisposed to commit crime. This theory underlying the entrapment defense has not been altered, but has been reaffirmed by this Court several times. See United States v. Russell, supra and Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819 (1958). The theory is one of cause and effect. The government may not

cause crime to be committed if the effect is that the "unwary innocent" are lured to its commission. This theory does not require an accused to show direct contact with a government agent before an entrapment defense will exist. It is not a rule without flexibility. Whether entrapment exists depends on all the facts and circumstances of a case with the focus on the government's conduct and the predisposition of the accused.

The decision in the instant case disregards the teaching of this Court. Instead of examining whether Petitioner was caused to commit a crime by the government which he was not otherwise predisposed to commit, the Court below applied a per se rule: the defense of entrapment is not available without direct inducement. This rule is rigid, unacceptable and does not comport with the raison d'etre of the entrapment defense. No reason exists to permit the government to act through a non-agent intermediary with the intent to cause another to commit a crime and thereafter

prosecute the individual indirectly induced to commit the crime. If the accused indirectly induced did not have the predisposition to commit the crime, then entrapment exists.

In the present case, the government agent, informant Walter Coughlin, dealt directly with Donna Ambrose, a woman who he previously knew. Ms. Ambrose was the girlfriend of a friend of informant, Walter Coughlin. He deliberately pressured her because he knew he could get her to look for drugs for him. But his pressure, unfortunately, was excessive to the extent that he threatened to kill her if she did not help him. Consequently, she relayed the threats to Petitioner and enlisted his aid. Petitioner, who lived in her apartment building, and was described at trial by a government agent as a "normal hard-working type of person" who was a "health nut" that rarely drank and never smoked, was reasonably concerned for her. This was not the typical case where a willing buyer of drugs approached a willing seller of drugs. In the present case, the government threatened a citizen to compel

the production of drugs. This conduct was reprehensible, see United States v. Ambrose, supra, at 3527, and a rigid definition of the defense of entrapment should not be applied to prevent those persons, including Petitioner, from asserting the defense.

II. A second reason for granting the Writ of Certiorari is the Court of Appeal's decision regarding Petitioner's speedy trial claim: it provides a standard for proof of prejudice which is insurmountable and unrelated to protecting the reliability of judicial proceedings.

In the instant case, a witness was missing as a result of delay by Respondent, but the court concluded Petitioner had not shown prejudice. The effect of the decision of the Court was to require Petitioner and those similarly situated to produce the missing witness to state what he would testify to at trial were he not missing before prejudice would be found to exist. Petitioner states this absurdity as the effect of the decision

below because Petitioner had introduced testimony of the conduct and statements of the government informant which caused him to commit the crimes with which he was charged. The testimony was that of a co-defendant, one Donna Ambrose, who had been directly induced by the government informant. Two facts must be remembered: 1) the conversation and events about which the Petitioner would have elicited testimony from the informant occurred when only the co-defendant and the informant were present together; and 2) the unavailable witness, an informant, was a government agent. There was only one way Petitioner could prove what testimony he expected to elicit from the informant: co-defendant Ambrose would have to testify as to the statements and actions of the informant. No one but the informant and co-defendant Ambrose could have testified regarding them. To conclude that the Petitioner was "unable to show what testimony they had a reasonable expectation the informer would have given," United States v.

Ambrose, supra at 1214, is to ignore co-defendant Ambrose's testimony. By what other means could the informant's expected testimony be proved? It is incredulous to conclude that sheer speculation is required to determine the trial testimony of the informant. See id. This conclusion rests upon the premise that co-defendant Ambrose was lying or that the informant would have lied had he testified. Petitioner submits this premise is not well founded nor one upon which our system of justice can operate. Moreover, this premise conflicts with a presumption to which Petitioner is entitled. The unavailable witness in this case was a government agent. As such, it may be presumed that if the agent's testimony was favorable to the government, the agent would have been available. United Broadcasting Co., Inc. v. Armes, 506 F.2d 766 (5th Cir. 1975) Thus, in addition to co-defendant Ambrose's testimony is the presumption arising against the government because the unavailable witness was one of its agents.

The presumption alone would be a basis for concluding that the testimony of the informant would have been favorable to Petitioner. Id. But the presumption is also coupled with the clear testimony of co-defendant Ambrose.

In Dickey v. Florida, 398 U.S. 30 at 53, 90 S.Ct. 1564 at 1576-1577 (1970), Justice Brennan, in a concurring opinion, spoke of the difficulty of proving what a missing witness would say. The court below has made the burden even more difficult - even impossible to overcome. The right to a speedy trial is fundamental. Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988 (1967). While prejudice is not required to be shown, United States v. MacDonald, - U.S. - , 102 S.Ct. 1497 (1982); Moore v. Arizona, 414 U.S. 25, 94 S.Ct. 188 (1973), it is an important factor to be weighed and can sometimes tip the scales in favor of finding a denial of speedy trial. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972) As the law now stands in the Eleventh Circuit, an accused will be unable to prove

prejudice unless the missing witness has provided an affidavit detailing what his testimony would be at trial.

There is no reason to ignore the testimony of a co-defendant in determining what the testimony of a missing witness would be. Thousands of people are not often privy to the commission of crimes. The actors are few and necessarily include the alleged accomplices of an accused. This Court could not have intended when it established prejudice as a factor to be considered in judging whether an accused had been denied a speedy trial that it be next to impossible to establish. Petitioner showed by competent evidence - in fact, the best evidence which could have been presented other than the missing witness himself - that he was prejudiced. This Court should insure that accused's are required to do no more. Otherwise, the test of Barker v. Wingo, supra, is significantly altered and the right to a speedy trial is significantly diminished.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

Channing E. Brackey
Attorney for Petitioner
Wayne Laglia
524 So. Andrews Avenue
Suite 102N
Ft. Lauderdale, Florida
33301
Telephone: 463-9800(305)

October 1983.

By: C. E. Brackey
CHANNING E. BRACKEY

APPENDIX

Appendix A. Opinion of the Court of Appeals,

Appendix B. Denial of Rehearing En Banc.
Appendix C. Judgment of the Court of Appeals.
Appendix D. Order of the District Court.
Appendix E. 18 U.S.C. 3161 et. seq.

CERTIFICATE OF SERVICE

I, CHANNING EDWARD BRACKEY, a member in good standing of the Bar of this Honorable Court, certify that I have served all parties to this proceeding by first class mail, postage pre-paid, with a copy of the Petition for Certiorari, a Certificate of Service and a Notice of Appearance this 25 day of October, 1983. The parties who were served and their addresses are:

1. United States of America
   The Honorable Rex E. Lee
   Solicitor General
   Department of Justice
   Washington, D.C. 20530

2. Patrick Leo Morris, personally at
   1120 N.E. 9th Avenue, Apt. 7
   Ft. Lauderdale, Florida

   AND through his attorney,
   Charles H. Vaughan, Esquire
   700 Southeast Third Avenue
   Suite 206
   Fort Lauderdale, Florida 33316

3. Linda Ambrose through her attorney
   Jose L. Larraz, Jr., Esquire
   2742 S.W. 8th Street
   Suite 214
   Miami, Florida 33135

App. A 1

UNITED STATES of America,
Plaintiff-Appellee,

v.

Donna AMBROSE, Wayne Laglia, Leo
Patrick Morris, Defendants-Appellants.

No. 81-5852.

United States Court of Appeals,
Eleventh Circuit

June 20, 1983

Defendants were convicted before the United States District Court for the Southern District of Florida, James C. Paine, J., of possession with intent to distribute a controlled substance and of conspiracy to possess with intent to distribute a controlled substance. The defendants appealed. The Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) defendants not threatened or coerced personally by government informer were not entitled to instruction which would have made clear to jury that they were entitled to entrapment defense should entrapment of codefendant be proven; (2) failure to raise issue in trial court of

violation of defendant's right to a speedy trial precluded consideration of issue on appeal; (3) defendants' Sixth Amendment rights to a speedy trial were not violated; and (4) trial court did not err in refusing to suppress evidence seized by drug enforcement agents in motel room in which drug transaction took place.

Affirmed.

1. Criminal Law 772(6)

Defendants not threatened or coerced personally by government informer were not entitled to instruction which would have made clear to jury that they were entitled to enrapment defense should entrapment of codefendant be proven, even though defendants' asserted reason for participating in scheme to distribute a controlled substance was to protect codefendant, who had allegedly been threatened by government informer if she did not procure certain drugs for informer.

2. Indictment and Information 144.1(1)

In prosecution for possession with intent to distribute a controlled substance, trial court did not err in refusing to dismiss indictment for failure of Government to produce government informer, in spite of demand by defendants, in view of fact that it was clear at time of trial that Government was unable to account for informer's present whereabouts. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1); 18 U.S.C.A. § 2.

3. Criminal Law 1035(1)

Failure to raise issue in trial court of violation of defendant's right to a speedy trial precluded consideration of issue on appeal. 18 U.S.C.A. § 3161 et seq.

4. Criminal Law 577.14

Where trial court, acting sua sponte, dismissed first indictment without prejudice solely on ground that technical rules of speedy trial statute had not been observed,

but reasons for Govermment's delay were adequate, length of delay was not inordinate, and no showing was made as to prejudice to defendants other than that at time trial occurred Government was unable to find an informer, reindictment within one month of dismissal and trial within one year and one week after first indictment was filed did not violate Sixth Amendment. U.S.C.A. Const. Amend. 6; 18 U.S.C.A. § 3161 et seq.

5. Criminal Law 394.1(3)

In prosecution for possession with intent to distribute a controlled substance, trial court did not err in refusing to suppress evidence of drug transaction seized in motel room based on alleged failure of drug enforcement agents to "knock and enter" in view of facts that, although record did not disclose whose room was being used for completion of drug transaction, there was some testimony that it was rented by government informer, and that door to room

was open when agents entered to make arrest. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1); 18 U.S.C.A. § 2.

Appeals from the United States District Court for the Southern District of Florida.

Before VANCE and HENDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

These three persons, apparently novices in the field, appeal from the conviction of a single indictment of possession with intent to distribute a controlled substance (methaqualone) in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 and with conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1).

Because of the degree of coercion and pressure used by one Walter Kelly, a govern-

ment informer, upon Donna Ambrose, if we are to accept her testimony as to what happened, we think it appropriate to consider what amounts to a "third party entrapment" defense by her co-defendants. This is the only ground of appeal that has sufficient weight to justify our dealing with it in this manner.

Ambrose testified that while her boyfriend was out of town on a vacation, his roommate, one Walter Kelly, sought her out and importuned her to find some source of illegal drugs to "take him off the hook;" that he had been approached by a Mafia figure from New York who was demanding a source of supply, and quickly. According to her testimony, they met together in a bar for a part of an afternoon, during which time he repeatedly told her that he was being threatened if he did not produce and that now that he had talked with her, her life also was on the line. She testified that she was greatly upset and distressed and refused

several times to have anything to do with a deal, saying she knew nothing about any such source of drugs. Following further importunities in the evening, including his putting a gun in her face and physically threatening her, she took him home, because "he didn't have a car."

Ambrose testified that in the next few days, she met Walter Kelly again and that he persisted in calling her and making further threats. She telephoned a friend, Wayne Laglia, to tell him of her predicament and the threat against her life, and begged him to help her find a source of drugs in order to satisfy the informer. This call to Laglia produced results and, although he also testified that he responded to her request only because of his fear for her safety, he did telephone several persons and finally found one William Martin Kelly who said he could produce 100,000 methaqualone tablets.

In the meantime, according to undisputed evidence, Ambrose and Walter Kelly, together

with the newly arrived "Mafia" man, who was a drug enforcement agent, waited in a motel room where they kept demanding that her sources produce the drugs at the agreed upon price.

At about 5:00 in the afternoon, following a promise from Ambrose to Walter Kelly that the deal could go down by about 2:00 p.m., William Martin Kelly and Laglia and one Leo Morris whom Laglia had originally called and who had, in fact, found William Kelly, the producer of the drugs, converged on the motel room where they were arrested.

It is not seriously disputed that during the three or four hours that they were in the room, Ambrose was actively trying to reach Laglia and he was in touch with Morris and/or Kelly. At one point the agents dumped on the bed some $75,000 in cash, which was counted by Ambrose and Laglia, and the deal was worked out for the price of the tablets.

The testimony of Ms. Ambrose as to the threats against Walter Kelly's life and

her own safety was not disputed by the government. The reason for this is that although Walter Kelly, the informer, had been paid $2,900 for information and for a bonus in connection with the deal, he had disappeared by the time of the trial. The government was unable to produce him, in spite of a demand by the defendants.[1] Ambrose and Kelly were the only witnesses to what was said between them.

The trial court's instruction to jury on entrapment follows:

> Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officer or their agents to commit a

---

1. The failure of the government to produce the informer was the basis of a motion by the appellants to dismiss the indictment. The motion was also based upon their contention that they were never furnished the name of Walter Kelly in response to the trial court's order. We do not reach this issue, because it was clear that ample notice of the identity of the informer was given to the defendants during earlier proceedings in the case, and because of the undisputed testimony by the government agent that he had made every effort to find Kelly, but was unable to do so.

crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Goverment agents provide what appears to be a favorable opportunity is not entrapment. For example, it is not entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to engage in an unlawful transaction.

If then the jury should find beyond a reasonable doubt from the evidence in the case that before anything at all occurred respecting the alleged offense involved in this case, the Defendant was ready and willing to commit a crime such as charged in the indictment, whenever opportunity was afforded, and that Government officers or their agents did no more than offer the opportunity, then the jury should find that the Defendant is not a victim of entrapment.

On the other hand, if the evidence in the case should leave you with reasonable doubt whether the Defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the Government, then it is your duty to find him not guilty.

We are unable to find any place in the record in which the appellants object to

this charge, although the government does not rely upon their failure to do so. Instead, the appellants contend that they were entitled to have a further charge on entrapment given to the jury, because of the fact that neither Laglia nor Morris was threatened or coerced personally by the informer. Their asserted reason for participating in the scheme was that they had been told by Ambrose the threats against her, as outlined above, and they were acting for her protection. They requested the trial court to include the following charge:

> You are instructed that a person may be brought into a criminal scheme after being informed indirectly of conduct or statements by a government agent which amount to an inducement, and that person is then able to avail himself or herself of the defense of entrapment, just as the person who receives the inducement directly.
>
> You are further instructed that you may find that a person who received inducement indirectly may have been entrapped even if you find that the person who received the inducement directly was not entrapped.

The trial court declined to include this additional instruction.

[1] As indicated above, the purpose for which this instruction was sought was to make it clear to the jury that when matters of inducement or entrapment were proven because of the conduct of agents of the United States in their approach to one of several defendants who then repeated the conversation to his co-defendants, including threats and the like, the co-defendants are entitled to the defense of entrapment, even though they were not directly approached by the government or its agents.

Although appellant Laglia states in his reply brief that: "Indeed the Fifth Circuit has concluded that inducement by a private citizen cannot support a claim for entrapment, United States v. Maddox, 492 F.2d 104, 106 (5th Cir.1974); United States v. Dodson, 481 F.2d 656 (5th Cir.1973)." This Court has most clearly restated this principle of law in United State v. Mers, 701 F.2d 1321 (11th Cir.1983), there we said: "A defendant cannot avail himself of an entrapment defense

unless the initiator of his criminal activity is acting as an agent of the government." At 1340, at ___. This opinion is, of course, binding on this Court unless and until overruled by the Court sitting en banc. We, therefore, must decline to consider a decision of the Court of Appeals for the Second Circuit in United States v. Valencia, 645 F.2d 1158 (2d Cir.1980), cited by appellants in support of their contention.

Moreover, it appears that the appellants here may have obtained a better charge in their favor than they were entitled to, in light of our recent decision in Mers, supra. At the time the trial court in this case gave the charge, neither this Court nor its predecessor, the Court of Appeals for the Fifth Circuit, seems to have decided precisely that under no circumstances could a defendant claim entrapment based upon a communication to him by a fellow defendant who related to him that he had been threatened or importuned in a manner that

would have entitled him to the submission of his entrapment defense to the jury.

The judge's charge in this case in no way directly limits the entrapment defense to the one person to whom the "law enforcement officers or their agents" communicated directly. The charge was thus a broader charge than these appellant were entitled to have given to the jury. We recognize that Ms. Ambrose's testimony as to the dire threats that had been made by the informer to her depicted seriously reprehensible conduct by the informer. However, the jury rejected this defense by her, so we must assume that at least some important parts of her testimony were not believed. There the matter must stand.

We conclude that we do not need to reach the precise question whether persons situated as were Laglia and Morris who establish by undisputed evidence that they have been brought into such a plan by a plea for help by their close friend, who told of threats

against her life, would be entitled to a jury trial on the issue of entrapment. In fact, if the trial court had been required to accept as true the testimony of the three defendants as to what it was that set up this deal in the first place, and the motivation of those who joined it, we would be inclined to view the government agent's conduct so reprehensible as to make it difficult not to reverse on due process grounds.

Unfortunately for these appellants, this issue was presented to the jury. The charge was broad enough to have permitted the jury to have acquitted these appellants. The jury refjected the defense, and there the matter must stand.

[2] We find that the trial court made no error in the manner in which it handled the demand for information and the forced presence of the government informer. While a response was not made to the specific court order requiring information concerning this prospective witness, the information had

been made available to the defendants and it is clear that at the time of trial, the government was unable to account for his present whereabouts.

[3] The trial court did not err in overruling the motion to dismiss the indictment for a violation of the appellant's right to a speedy trial, either as a violation of the Sixth Amendment to the Constitution or under the Speedy Trial Act. As to the alleged denial of the defendant's rights under the Speedy Trial Act, this issue is not before us because it was not raised in the trial court.

These defendants were tried and convicted upon a superseding indictment, the first indictment having been dismissed by the trial court, acting sua sponte, on the ground that the government had not acted sufficiently promptly in bringing the case to trial. The trial court expressly stated that the dismissal was without prejudice. Thereafter, the government presented the matter a second time to a grand jury and the second indictment

was filed on April 6, 1981. This was within a month of the dismissal of the first indictment. The trial of the defendants commenced on June 24, after several intervening motions transferring the case from one judge to another. In considering appellant's contention that they were denied a speedy trial under the Sixth Amendment, we note that the trial of the defendants was begun within a year and a week after the first indictment was filed. We also note that the order of dismissal of the first indictment was not made on the government's motion, thus obviating any suggestion that the government was attempting to start the time limits running anew after some default by it by dismissing the original indictment. Cf. United States v. Hencye, 505 F.Supp. 968, 971 (N.D.Fla.1981).

[4] Both the government and appellants point to the case of Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) as giving the standard by which a

district court should weigh the factors in considering whether a defendant's Sixth Amendment rights had been violated. These factors are: (a) length of the delay; (b) reason for the delay; (c) defendant's assertion of his right; and (d) the prejudice to the defendant. Reviewing the sequence in which the events occurred before the dismissal of the first indictment, it is plain that the trial court would not have concluded that there was a Sixth Amendment violation of the defendant's right to a speedy trial. The court dismissed the indictment solely on the ground that the technical rules of the Speedy Trial Act had not been observed. The defendants made no motion for this order of dismissal, contending only that their Sixth Amendment rights had been violated. We agree with the trial court that there was not an inordinate delay in bringing the first indictment to trial. Considering (b) above, we agree that the reasons for delay were adequate. It

is plain that as to the third factor, the defendants asserted their right in the trial court. As to the fourth, no showing was made as to the prejudice to the defendants other than that at the time the trial occurred the United States was unable to find the informer. The difficulty here, is that the appellants were unable to show what testimony they had a reasonable expectation the informer would have given in their favor if he had been found. Instead, Ambrose's testimony went to the jury undisputed. It would be sheer speculation for either the trial court or for us to hold that the defendant had made a showing of prejudice to meet the Barker test.

[5] Finally, we conclude that the trial court did not err in overruling the motion to suppress based on the alleged failure of the DEA agents to "knock and enter" as provided under 18 U.S.C. § 3109. The record does not disclose whose room was being used for the completion of this transaction, although

there is some testimony that it was rented by the informer. Moreover, this is evidence that the door was open when the agents entered to make the arrest. We conclude that the trial court did not err in overruling these motions to suppress.

The judgments are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5852

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONNA AMBROSE,
LEO PATRICK MORRIS,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

(AUGUST 15, 1983)

Before VANCE, HENDERSON and TUTTLE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-4
(Rev. 6/82)

UNITED STATES COURT OF APPEALS

For The Eleventh Circuit

No. 81-5852

D.C. Docket No. 81-6036-CR-JCP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONNA AMBROSE, WAYNE LAGLIA,
LEO PATRICK MORRIS,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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Before VANCE and HENDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

June 20, 1983

App. D 22

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-6060-Cr-JCP

UNITED STATES OF AMERICA, Plaintiff vs. DONNA AMBROSE, et al., Defendants	ORDER OF DISMISSAL

This cause is before the Court on a sua sponte Motion to Dismiss for violation of the Speedy Trial Act. This case has been set for trial numerous times, but the case agent for the government has been out of the country since January 26, 1981. The government has just notified the Court that the agent will be absent until at least March 23, 1981.

Accordingly it is

ORDERED AND ADJUDGED that this cause is dismissed without prejudice for violation of the Speedy Trial Act.

DONE and ORDERED at West Palm Beach,

Florida, this 6th day of March, 1981.

United States District Judge

cc: Ray Sandstrom, Esq.
Lurana Snow, AUSA
James A. McCauley, Esq.
John Berk, Esq.
Charles H. Vaughan, Esq.
Charles J. Rich, Esq.

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent...

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same

offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be...

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the efrective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to-

(A) delay resulting from any proceeding, including any examinations to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to

section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written

agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at

a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of diligence.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.